LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JAN 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1010

MRS. J. W. SCHOONOVER,
Petitioner,

vs.

THE STATE OF KANSAS,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

PETITION FOR WRIT OF CERTIORARI

THOMAS W. BROOKS
and
WILLIAM D. HAMBLIN
BROOKS & HAMBLIN CHARTERED
9009 W. 95th Street
Overland Park, Kansas 66212
Attorneys for Petitioner

E. L. Mendenhall, Inc., 926 Cherry St., Kansas City, Mo. 64106, 816-421-3030

INDEX

TABLE OF AUTHORITY I
BODY OF PETITION 1
APPENDIX—

Memorandum Decision of the District Court of Franklin, County, Kansas A1
Opinion of the Supreme Court of Kansas A13
Verbatim Text of All Statutes Cited A28

Table of Authority

CASES

Escobedo v. *Illinois*, 378 U.S. 478 (1964) 6
Holt v. *Virginia*, 381 U.S. 131 (1965) 6
In re Gault, 387 U.S. 1 (1967) 6
In re Steere, 217 Kan. 276 (1975) 4
McKenna v. *Ellis*, 280 F.2d 592 (5th Cir. 1960) ... 7
Pointer v. *Texas*, 380 U.S. 400 (1965) 6
Powell v. *Alabama*, 287 U.S. 45 (1932) 6
Swenson v. *Bosler*, 386 U.S. 258 (1967) 6

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States—

Amendment VI 2, 5, 6, 7
Amendment XIV 2

K.S.A. 21-3904 ..... 4, 7
K.S.A. (1972 Supp.) 21-3401 2
K.S.A. 59-513 3
K.S.A. 60-1507 3
28 U.S.C.A. 1257 (3) 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. _____

MRS. J. W. SCHOONOVER,
Petitioner,

vs.

THE STATE OF KANSAS,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

PETITION FOR WRIT OF CERTIORARI

Petitioner, Mrs. J. W. Schoonover, presents her petition for a Writ of Certiorari, and states:

1. That this petition is presented under and pursuant to 28 U.S.C.A. 1257 (3), and is accompanied by a certified transcript of the Record on Appeal to the Supreme Court of Kansas.

2. That on December 13, 1975, the Supreme Court of Kansas affirmed her conviction and sentence of life imprisonment for murder in the first degree imposed after trial by jury, and that it is this judgment which the petitioner seeks to have reviewed. This opinion of the Supreme Court of Kansas has yet to appear in the advance sheets, and so petitioner is unable to cite it;

however, the opinion appears in full at *Appendix*, pp. A13-A27.

3. That the question presented for review is as follows: Was it error for the Supreme Court of Kansas to rule that even though this petitioner's court appointed trial counsel acted in a dishonest and unethical manner toward her, the trial court, and the State of Kansas, that the petitioner was not denied her right to adequate and effective assistance of counsel?

4. That the provisions of the Constitution of the United States which this case involves are the Sixth Amendment guarantee to the accused of the right to assistance of counsel for defense, and the Fourteenth Amendment, by which this Sixth Amendment guarantee is applied to the States. The applicable provisions of these Amendments state verbatim that:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense. U.S. Const. amend. VI.
>
> Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person in its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, sec. 1.

5. That the facts material to the questions presented in this case are as follows:

On April 26, 1974, in the District Court of Franklin County, Kansas, the petitioner, represented by her court appointed counsel Myron S. Steere, was sentenced to life imprisonment after being found guilty by a jury of murder in the first degree pursuant to K.S.A. (1972 Supp.) 21-3401.

On September 6, 1974, the petitioner filed with the District Court of Franklin County, Kansas, an Omnibus Petition and Application for Relief with Memorandum in support, pursuant to K.S.A. 60-1507, wherein she prayed for a new trial based upon a denial of her constitutional right to assistance of counsel. This was a separate civil action wherein the petitioner contended that several acts of misconduct on the part of her appointed trial counsel had worked together to deprive her of adequate assistance of counsel. It was at this point that petitioner first presented constitutional issues for determination. *Record*, p. 4.

Although several acts of misconduct were alleged, the crux of the petitioner's contention that she was in effect denied the assistance of counsel centers around her allegation that a contingent fee contract was entered into between the petitioner and her appointed counsel. *Record*, p. 38. Petitioner contended that this contingent fee contract was brought to her by her trial counsel on March 4, 1974, for her signature. With trial set only one week away on March 11, 1974, petitioner had little choice but to sign the contract.

The contract in question provided that in the event petitioner was acquitted, or convicted of such lesser offense as would not take away her inheritance from her late husband under K.S.A. 59-513, she would pay to her counsel all of this inheritance except for the sum of $10,000. Petitioner maintained that this contract was a breach of faith and trust on the part of Steere, as well as giving him a direct pecuniary interest in seeing her either acquitted or convicted of such lesser offense as would not take away her inheritance, i.e., involuntary manslaughter. Knowing that the State would never accept a plea to a lesser offense such

as involuntary manslaughter, Steere was driven by the terms of the contract not to seek any plea bargain. A plea to murder in the second degree or to manslaughter, for example, would still remove from the petitioner her inheritance, and at the same time deprive Steere of his lucrative contingent fee. Therefore, petitioner contended in her Omnibus Petition that the contingent fee contract caused her trial counsel to have a conflict of interest, and accounted for the fact that he did not institute any plea negotiations.

On November 12, 1974, the trial court held an evidentiary hearing regarding this Omnibus Petition, and on November 18, 1974, issued its findings of fact and conclusions of law. *Record*, p. 39; *Appendix*, p. A1. The trial court found that the contingent fee contract in question was in fact a violation of DR 2-106 (c) of the Code of Professional Responsibility, as promulgated by the Supreme Court of Kansas. Steere did not at any time prior to or during the trial notify the trial court of this contract. The trial court found further that Steere received $4,227 from the State of Kansas for his services as appointed counsel. *Record*, p. 43. Thus Steere was not only guilty of a violation of the Code of Professional Responsibility, but he also perpetrated a fraud upon the State of Kansas by accepting public monies for appointed representation after entering into a private contract for payment with his client. In fact, presenting a false claim to a public body for over $50 is a felony pursuant to K.S.A. 21-3904. Steere was subsequently punished by public censure by the Supreme Court of Kansas. See: *In re Steere*, 217 Kan. 276 (1975).

The trial court held as a matter of law that the fact that counsel entered into an unethical agreement and

breached his professional responsibility does not of itself constitute inadequate or ineffective representation of counsel. The trial court also held that failure of trial counsel to initiate or institute plea negotiations does not of itself constitute a denial of a constitutional right. *Record*, p. 45.

On November 20, 1974, notice of appeal to the Supreme Court of Kansas, with Statement of Points, was filed by the petitioner. *Record*, pp. 52-53. In the Statement of Points the constitutional issues regarding adequacy of counsel are first presented to the Supreme Court of Kansas for determination. On December 13, 1975, the Supreme Court of Kansas affirmed the judgment of the District Court of Franklin County, Kansas, and passed upon the constitutional issues by holding that dishonest and unethical conduct on the part of appointed counsel does not of itself amount to a denial of effective assistance of counsel. Instead, the court reasoned that the adequacy and effectiveness of an attorney's services on behalf of an accused in a criminal action must be gauged by the actual representation afforded the accused in its totality. The opinion of the Supreme Court of Kansas is set out in full at *Appendix*, pp. A13-A27.

6. That her argument amplifying the reasons relied upon for the allowance of the writ are as follows:

This is a case in which a state court has decided a federal question of substance not theretofore decided by this court. Although this court has often in the last decade construed the ramifications of the Sixth Amendment guarantee to assistance of counsel, it has never before decided a case where an allegation of a denial of this Sixth Amendment guarantee is predicated upon dishonest and unethical conduct on the part of

defendant's appointed counsel, where such dishonest and unethical conduct by counsel is not collateral to his representation, but goes to the heart of the attorney-client relationship.

Over forty years ago this court decided *Powell* v. *Alabama*, 287 U.S. 45 (1932), the seminal right-to-counsel case. The Sixth Amendment itself states simply that "The accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. It was through the *Powell* decision that the requirement that assistance of counsel be adequate and effective came into existence. Following *Powell* have come a number of decisions construing at what stage and in what type of proceeding the right to counsel attaches. See: *Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Holt* v. *Virginia*, 381 U.S. 131 (1965); *Swenson* v. *Bosler*, 386 U.S. 258 (1967); and *In re Gault*, 387 U.S. 1 (1967).

But what is adequate and effective assistance of counsel? No easy rule, no clear-cut guidelines have come forth. Instead, from the many courts considering the issue have come many pronouncements. Some standards which courts have used in determining adequacy of counsel include: representation which substantially prejudices the defendant; representation by counsel who is actually incompetent; representation which makes the trial a sham or a farce; and representation which lacks fundamental fairness. The United States Court of Appeals for the Fifth Circuit states the standard in the following manner:

> We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective

> by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. WE CONSIDER UNDIVIDED LOYALTY OF APPOINTED COUNSEL TO CLIENT AS ESSENTIAL TO DUE PROCESS. *McKenna* v. *Ellis*, 280 F.2d 592, 599 (5th Cir. 1960) (emphasis added).

Petitioner contends that her Sixth Amendment right to adequate and effective assistance of counsel has been denied her. Her appointed attorney entered into an unethical and illegal contract of employment with her. This is not a case where counsel's unethical or illegal conduct was collateral to the attorney-client relationship; Steere's dishonesty went directly to the heart of the relationship. Petitioner clearly did not enjoy his undivided loyalty. Steere's conduct toward the trial court was unethical in that he did not inform that court of his private contract with the petitioner. Finally, Steere's conduct was dishonest to the State of Kansas. As stated earlier, presenting a false claim to a public body for over $50 is a felony pursuant to K.S.A. 21-3904.

In the final analysis, the ultimate standard of the adequacy of counsel rests in the Due Process clause itself. Counsel for the petitioner respectfully submits that the representation afforded her lacks that fundamental fairness and substantial justice which the concept of due process demands.

By: THOMAS W. BROOKS

and

WILLIAM D. HAMBLIN

APPENDIX

MEMORANDUM DECISION

This matter comes on for trial on November 12, 1974. Petitioner appears in person with her counsel, Thomas W. Brooks, and William D. Hamblin, and the State appears by Robert L. Pinet, County Attorney.

After hearing evidence, the Court takes matter under advisement.

Now on this 18th day of November, 1974, the Court having considered the evidence, makes the following findings of fact, conclusions of law and decision:

FINDINGS OF FACT

1. This is a proceeding under K.S.A. 60-1507 to set aside, vacate or correct the judgment and sentence in criminal case number 3824, State of Kansas v. Nellie L. Schoonover.

This is a civil action and the petitioner has the burden of proof to sustain by a preponderance of the evidence her claim for relief on the issues set forth herein.

2. The Court finds that the petitioner is confined at the Lansing Correctional Institution for Women, at Lansing, Kansas, pursuant to the judgment and sentence imposed on April 26, 1974, wherein the petitioner was sentenced to life imprisonment for murder in the first degree, under K.S.A. 21-3401 and K.S.A. 21-4501(a), 1972 Supp. Verdict was rendered on March 25, 1974.

3. The petition was filed on September 6, 1974, by retained counsel, Thomas W. Brooks and William D.

POOR COPY

Hamblin, Attorneys, Overland Park, Kansas. That there is pending before the Supreme Court of Kansas, the appeal of petitioner from the conviction herein.

Further that Myron S. Steere, attorney for petitioner in the district court case and in the pending appeal, was appointed by the Court because of petitioner's indigency. The Court granted leave of Mr. Steere to withdraw as counsel on the basis of the request of the petitioner by letter dated August 30, 1974.

That at the present time Mr. Thomas W. Brooks and Mr. William D. Hamblin are representing petitioner by private employment by petitioner.

4. The Court has ordered that petitioner be present at this hearing because of the nature of the sentence imposed upon her and for any evidentiary matters to be presented to the Court.

5. The Court requires petitioner to present at this hearing all issues that might affect the validity of the judgment and sentence. The purpose of this ruling is to prevent piecemeal and repetitious petitions for relief.

The Court will hear and consider all matters that might affect the validity of the judgment and sentence imposed in case number 3824.

In absence of any proof on any issue the Court will find against the petitioner.

6. The Court has ruled that a motion to vacate a sentence under K.S.A. 60-1507 cannot be maintained while an appeal is pending or during the time within which an appeal may be perfected. The petitioner orally moved to abandon and dismiss her present appeal, desiring to proceed on the present motion.

After inquiry by the Court of the petitioner, the Court finds that the dismissal of the appeal is voluntarily and knowingly done and the Court sustains said motion.

7. The Court further advised petitioner and counsel that a proceeding under K.S.A. 60-1507 cannot ordinarily be used as a substitute for a direct appeal unless trial errors affect constitutional rights and provided there were exceptional circumstances excusing failure to appeal. The burden is upon petitioner to show exceptional circumstances.

8. The Court finds that the issues raised by petitioner in this hearing are outside the trial record and consist of a collateral attack on the conviction and sentence, except the issue concerning voir dire of jurors, which may be raised in a direct appeal.

However, on the basis that all other issues being raised by petitioner are proper in a motion under K.S.A. 60-1507 the Court will take jurisdiction to hear all issues raised by petitioner in this proceeding.

The time for appeal has lapsed and there is no appeal pending from conviction and sentence imposed herein.

9. The Court has taken judicial notice of the files of case number 3824, State v. Nellie Schoonover, case no. 12-676, In the Matter of the Estate of J.W. Schoonover, deceased, in the Franklin County Probate Court, case number 26-246, Shelby Schoonover v. Joseph W. and Nellie Rutledge Schoonover and case number 26-245, Charles C. Schoonover v. Joseph W. and Nellie Rutledge Schoonover, in the District Court of Franklin County, Kansas, and the Code of Professional Responsibility, set forth in the Rules of the Supreme Court of Kansas, 205 Kansas Reports.

10. ISSUES RAISED BY PETITIONER:

THE PETITIONER WAS DENIED HER CONSTITUTIONAL RIGHT TO ADEQUATE AND EFFECTIVE ASSISTANCE OF COUNSEL IN THE FOLLOWING PARTICULARS:

A. HER COURT APPOINTED COUNSEL ENTERED INTO A WRITTEN AGREEMENT WITH PETITIONER PROVIDING FOR A CONTINGENT FEE BASED UPON THE OUTCOME OF THE TRIAL.

B. HER COURT APPOINTED COUNSEL FAILED TO INITIATE OR ENTER ANY PLEA NEGOTIATION FOR A NONTRIAL DISPOSITION OF THE CASE.

C. HER COURT APPOINTED COUNSEL ACCEPTED APPOINTMENT AS ATTORNEY FOR PETITIONER KNOWING THAT HE WAS A MATERIAL WITNESS ON BEHALF OF THE PETITIONER AND THAT HE WAS ENDORSED AS A WITNESS ON BEHALF OF THE STATE.

D. HER COURT APPOINTED COUNSEL REPRESENTED THE DECEDENT, JOSEPH W. SCHOONOVER, PRIOR TO HIS DEATH, ALL IN CONFLICT WITH THE INTEREST OF PETITIONER.

E. HER COURT APPOINTED COUNSEL FAILED TO SEEK A CHANGE OF VENUE.

F. HER COURT APPOINTED COUNSEL CONDUCTED THE VOIR DIRE OF JURORS TO THE PREJUDICE OF PETITIONER'S RIGHT TO A FAIR TRIAL.

FINDINGS ON ISSUE A:

1. Petitioner's Exhibit A-1 constitutes an agreement whereby petitioner agreed to pay to her court appointed counsel, Myron S. Steere, the right, title and interest she may be entitled to as her share of the estate of the decedent, J. W. Schoonover, except $10,000, in the event that petitioner was found not guilty of the murder of the decedent or convicted of a lesser offense that does not take away her inheritance. In the event a fee is so payable, counsel would not receive any compensation from the State as a result of his appointment. The agreement was dated March 4, 1974, and signed by petitioner and accepted by Mr. Steere's signature.

2. The State of Kansas paid to Mr. Steere the sum of $4,227.00 for services rendered in case number 3824.

3. DR 2-106(C) of Canon Two (2) Code of Professional Responsibility, promulgated by the Supreme Court of Kansas, provides that a lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

4. The fact that counsel entered into a unethical agreement and breached his professional responsibility may expose him to disciplinary sanctions but this, standing alone, does not constitute inadequate and ineffective representation.

The agreement called for a payment of substantial sum (approximately $50,000.00) if petitioner were found not guilty of any felonious killing of her husband.

POOR COPY
BLEED THROUGH

It would inure to counsel's financial benefit to have petitioner either acquitted or found guilty or plea guilty to a charge of involuntary manslaughter or lesser offense, for under K.S.A. 59-513, one who feloniously kills another may not inherit from the estate of the deceased.

The contention of petitioner that this situation precluded counsel from initiating any plea negotiation is determined in Finding B and will be discussed therein.

The petitioner fails to sustain the burden that the agreement constituted a denial of her constitutional right to adequate and effective assistance of counsel.

FINDINGS IN ISSUE B:

1. The record shows that counsel did not make any contact with the prosecutor, Robert L. Pinet, in regard to any plea negotiation to dispose of the case without a trial based upon a plea of guilty to a lesser charge. The petitioner was charged with murder in the first degree.

2. Petitioner testified that her counsel did not confer with her in this regard. Counsel testified that he conferred with petitioner on eighteen to twenty-five occasions and that at each instance, petitioner advised him not to negotiate for any plea.

3. Robert L. Pinet testified that Mr. Steere made no contact with him in regard to any plea negotiations and even if Mr. Steere had, he would have considered any offer but was in no position to do anything but try her as charged.

4. Section 6.1 of American Bar Association Standards, Defense Function, provides . . . . "(b) when

the lawyer concludes, on the basis of full investigation and study, that under controlling law and the evidence a conviction is probable, he should so advise the accused and seek his consent to engage in plea discussions with the prosecutor, if such appears desirable.

(c) Ordinarily the lawyer should secure his client's consent before engaging in plea discussions with the prosecutor."

5. Assuming that the petitioner's version in paragraph 2 above is more credible, failure of counsel to initiate or institute plea negotiations does not in itself constitute a denial of a constitutional right not constitute inadequate or ineffective counsel. The failure to comply with a recommended Standard does not necessarily imply a denial of a constitutional right requiring a vacation of a conviction, otherwise valid.

In addition, Mr. Steere testified that he did confer with petitioner on many occasions but each time petitioner advised him not to negotiate.

The petitioner has failed to meet the burden on this issue.

FINDINGS ON ISSUE C:

1. The night of the homicide, after the shooting, petitioner telephoned for Mr. Steere to have him come out to the residence. She regarded him as her lawyer and sought advice from him. That evening petitioner went to the home of counsel and his family.

2. Mr. Steere participated as her counsel at her request from the time after the shooting until his appointment as her counsel by the magistrate on November 7, 1973, after a finding of indigency.

POOR COPY

BLEED THROUGH

3. Petitioner regarded counsel as lawyer for her and her husband, while he was alive, and in fact counsel represented both in the district court cases filed by Mr. Schoonover's sons, Shelby and Charles C. Schoonover (260246 and 26-245) against petitioner and husband.

4. The state endorsed Mr. Steere as a witness on behalf of the state, but he was removed by motion of Mr. Steere on order of the court.

5. In all criminal cases, counsel for the defendant, of necessity becomes aware of many evidentiary facts concerning the case and this in no way would subject him to be a witness on behalf of the state. All information obtained by Mr. Steere from the moment of his call by petitioner was under the privilege as lawyer. The state would not be permitted to call counsel as a witness.

6. The fact that counsel was aware of and had knowledge of some of Mr. and Mrs. Schoonover's personal business, and represented Mr. Schoonover and Mrs. Schoonover, does in no way constitute a conflict of interest to the prejudice of the petitioner.

Petitioner was well aware of this, thus there was no obligation on the part of Mr. Steere to inform her, as is required in conflict of interest matters. Petitioner agreed to counsel's representation as shown in the transcript of the pretrial conference of January 31, 1974, p. 34, wherein petitioner stated that she was "very much satisfied" with Mr. Steere.

7. Petitioner fails to sustain the burden on this issue.

FINDINGS ON ISSUE D:

The findings of the Court in C above apply herein.

Petitioner has failed to meet the burden on this issue.

FINDINGS ON ISSUE E:

1. The record shows no motion or request for a change of venue was made by petitioner or her counsel.

2. On p. 14 of the pretrial conference of January 31, 1974, the Court inquired of counsel and the petitioner whether a change of venue was to be requested. Counsel indicated that none was anticipated. The record fails to show it, however, the Court looked at the petitioner at the time of counsel's answer and petitioner nodded agreement with counsel's statement.

3. Petitioner testified that she agreed that no change of venue would be requested but this was because of advice of her counsel that no place in the state could petitioner have a fair trial and if it became impossible to obtain a jury petitioner would have to "go free".

4. The record of proceedings of March 12, 1974, p. 248, reflects that this Court informed counsel and petitioner that the Court expected a jury in Franklin County to be selected no matter how long it would take.

5. Mr. Steere testified that petitioner advised him not to request a change of venue.

6. Failure to request a change of venue in this case does not constitute a denial of a constitutional right nor constitute inadequate of ineffective counsel.

POOR COPY

BLEED THROUGH

This apparently was trial strategy by counsel with petitioner's full and knowing agreement.

Petitioner has failed to meet the burden on this issue.

FINDINGS ON ISSUE F:

1. The voir dire of all prospective jurors was conducted in the Court's chambers, each juror individually appearing and questioned by Court and counsel for the state and petitioner, with petitioner present at all times.

2. Several jurors were asked questions concerning the petitioner's background, particularly the fact that she had been married and divorced a number of times, that petitioner might have been arrested for DWI, and that petitioner had been imprisoned on previous occasions.

In each instance, each juror indicated that these facts would not affect their verdict.

3. The Court informed the parties that none of the above would be admissible by the state under the Rules of Evidence.

4. Mr. Steere testified that he was aware that these matters were not admissible but petitioner insisted that these questions be propounded to the jurors. Petitioner denied that she insisted.

5. Petitioner prepared a statement of questions for counsel to ask of the jurors (State's Exhibit 2). Included therein are questions relating to petitioner's "nine husbands" (question 10), prison confinement (questions 5, 6, 7, 8, 9).

6. The Court notes that the context of the questions and the admonition by petitioner to "challenge"

jurors indicate that petitioner was not a novice in these matters as she attempts to portray to the Court. The Court also notes that during the trial and the pretrials, petitioner took a most active role in note-taking and conferring with counsel.

7. Questions propounded by counsel to various jurors concerning the petitioner's background and record, under the circumstances herein, were done so with the awareness of petitioner and with consent of petitioner and constitute trial strategy.

Petitioner fails to meet the burden on this issue.

CONCLUSIONS OF LAW

1. The Court finds that the petitioner has failed to sustain the burden of proof by a preponderance of the evidence that she has been denied constitutional right to effective and adequate counsel.

2. Findings of fact, conclusion of law and judgment is entered against petitioner and her motion to set aside or vacate the conviction and sentence imposed on April 26, 1974, is hereby denied, effective this 18th day of November, 1974.

MEMORANDUM OPINION

The petitioner contends that when all of the above conduct of counsel is considered in toto, it constitutes a complete breach of professional responsibility and trust and that justice requires that a new trial be granted to her.

The Court expects and demands that an attorney must act with the utmost honesty, good faith, fairness, integrity and fidelity in the representation of his client. An appointed counsel has no less duty

POOR COPY

to an indigent client. He is required to represent his client with all his skill and learning.

The law does not guarantee the assistance of the most brilliant lawyer but it does require diligence, honesty, loyalty and a genuine representation of his client's interest. Adequacy of counsel must be judged by the totality of the representation.

In the matters of trial strategy, counsel should control this area but should do so only after full consultation with his client and full disclosure and advice by counsel. In regard to failure to request a change of venue and voir dire of jurors, petitioner was fully informed and together they chose the road to take. This Court will not second guess and say that this action constitutes ineffective and inadequate counsel.

In the matter of failure to initiate plea negotiation, counsel may not propose to plea his client without express consent of the client and should not institute any negotiation without the client's approval. The record supports the finding of the Court that petitioner informed counsel not to negotiate.

In the matter of any conflict of interest, counsel has the professional obligation to fully inform his client of any matter which may even smack of a conflict and he is required to withdraw from the case if there is or may be a conflict of interest with his client's interest. Here the petitioner was fully informed and aware of all matters since she considered counsel as her lawyer as well as her husband's lawyer and they both retained counsel to handle their matters. In addition, petitioner initially employed counsel in the criminal case, the appointment coming later due to her indigency.

The matter of the contingent fee agreement is of serious concern to the Court. Counsel states that he was not aware that this agreement is unethical, and further, that he approved it only after insistence by the petitioner.

The Court has found that execution of this agreement did not constitute a denial of a constitutional right of petitioner affecting her trial.

It is not intended by this finding that this conduct by experienced counsel is condoned or accepted. Contingent fee agreements constitute unethical conduct under the Code of Professional Responsibility. It is the obligation of this Court to forward a copy of this decision and opinion, along with a copy of the agreement, to the Honorable Earl Hatcher, Disciplinary Administrator, for whatever action deemed appropriate.

No. 47,821

MRS. J. W. SCHOONOVER,
Appellant,

v.

THE STATE OF KANSAS,
Appellee.

SYLLABUS BY THE COURT

1.

The adequacy and effectiveness of an attorney's services on behalf of an accused in a criminal action must be gauged by the actual representation afforded the accused in its totality. To be a denial of an accused's constitutional rights it must clearly appear that the representation of the accused was wholly ineffective and inadequate.

POOR COPY

2.

It is unprofessional conduct for a lawyer to enter into an arrangement, charge or collect a contingent fee for representing a defendant in a criminal case. (Code of Professional Responsibility, DR 2-106 [C]; American Bar Association Standards relating to The Defense Function § 3.3.)

3.

Unprofessional conduct by defense counsel in violation of a disciplinary rule contained in the Code of Professional Responsibility does not constitute ineffective and inadequate counsel as a matter of law. It is simply one factor to be considered as a part of the totality of circumstances in making a judicial determination as to whether an accused has been provided representation by effective counsel.

Appeal from Franklin district court; MICHAEL A. BARBARA, assigned judge. Opinion filed December 13, 1975. Affirmed.

William D. Hamblin, of Overland Park, argued the cause, and *Thomas W. Brooks*, of Overland Park, was with him on the brief for the appellant.

Robert L. Pinet, county attorney, argued the cause, and *Curt T. Schneider*, attorney general, was with him on the brief for the appellee.

The opinion of the court was delivered by

PRAGER, J.: This is a proceeding brought by the petitioner-appellant, Mrs. J. W. Schoonover, pursuant to K.S.A. 60-1507 to set aside a conviction and sentence of life imprisonment for murder in the first degree imposed after trial by jury. The factual circumstances surrounding the homicide are not set forth with

particularity in either the record or briefs of counsel. Suffice it to say Mrs. Schoonover was charged with the premeditated murder of her husband, J. W. Schoonover, on October 24, 1973, in Franklin county. The petitioner does not contend that the evidence presented at the trial was insufficient to sustain the verdict of the jury. Mrs. Schoonover through her attorney filed a direct appeal from her conviction which was abandoned following the institution of the present proceeding. The theory behind Mrs. Schoonover's petition for relief in this case is that she was denied her right to effective assistance of counsel as guaranteed by the Sixth Amendment to the Constitution of the United States. Her court-appointed counsel was Myron S. Steere, a practicing attorney of Ottawa, Kansas.

In her 60-1507 motion Mrs. Schoonover alleged that she was denied her constitutional right to effective assistance of counsel because of the following claimed acts of misconduct on the part of her court-appointed attorney:

(1) He entered into a written agreement with petitioner providing for a contingent fee based upon the outcome of the trial.

(2) He failed to initiate or enter any plea negotiations for a nontrial disposition of the case.

(3) He accepted appointment as attorney for petitioner knowing that he was a material witness on behalf of the petitioner and that he was endorsed as a witness on behalf of the state.

(4) He represented the decedent, Joseph W. Schoonover, prior to his death which was in conflict with the interest of petitioner.

(5) He failed to seek a change of venue.

(6) He conducted the voir dire of jurors to the prejudice of petitioner's right to a fair trial.

Following the filing of the motion to vacate the Honorable Michael A. Barbara, district judge of Shawnee county, was assigned to hear the matter. Judge Barbara had previously been assigned and served as the trial judge in the murder case. He promptly set the matter down for hearing and the petitioner was afforded a full evidentiary hearing on the issues raised in her motion. After hearing evidence and arguments of counsel the trial court took the matter under advisement and thereafter entered judgment denying the motion and making comprehensive findings of fact and conclusions of law. In its findings of fact the trial court correctly stated that in a proceeding under K.S.A. 60-1507 the petitioner had the burden of proof to sustain by a preponderance of the evidence her claim of relief upon the issues presented. (*Winter* v. *State*, 210 Kan. 597, 502 P. 2d 733.) The findings of the trial court will not be repeated here in their entirety. We will set forth only those findings of the trial court pertaining to the specific points raised by the petitioner on this appeal

In regard to the failure of defense counsel to negotiate and enter into plea negotiations with the prosecutor, the trial court found as follows: Petitioner's appointed counsel, Myron S. Steere, did not make any contact with the prosecutor for the purpose of plea negotiations. Steere conferred on 18 to 25 occasions with petitioner and at each instance petitioner advised him not to negotiate for any plea. The county attorney, Robert L. Pinet, testified that although he would have considered any offer for plea negotiations he was in no position to do anything but try Mrs. Schoon-

over as charged. The trial court noted that the American Bar Association Standards for Criminal Justice, The Defense Function § 6.1, provides that ordinarily the lawyer should secure his client's consent before engaging in plea discussions with the prosecutor. In view of this evidence the trial court concluded that the petitioner had failed to meet her burden of proof on this issue.

In regard to the claim of petitioner that her appointed counsel had accepted his appointment knowing that he was a material witness on behalf of the petitioner and that he was endorsed as a witness on behalf of the state, the trial court found that on the very evening of the homicide petitioner telephoned Mryon S. Steere and requested him to come to her residence and that he thereafter participated as her counsel at her request. It was undisputed that the petitioner regarded Mr. Steere as her lawyer both for herself and her husband while he was alive. The trial court found that the fact that Steere had knowledge of some of Mr. and Mrs. Schoonover's personal business and had represented them did not in any way constitute a conflict of interest to the prejudice of the petitioner. With full knowledge of the fact of Mr. Steere's prior representation petitioner agreed to his representation as shown by her statement at the pretrial conference where petitioner stated that she was very much satisfied with Mr. Steere. Furthermore the trial court ordered that the state would not be permitted to call Steere as a witness since any information about the case obtained by Steere in his capacity as Mrs. Schoonover's lawyer was privileged. The trial court found that the petitioner had failed to sustain her burden of proof on this issue.

As to the complaint of petitioner that Steere had represented the decedent, Joseph W. Schoonover, prior

to his death, the trial court found that this did not per se constitute a conflict of interest to the prejudice of the petitioner and that the petitioner had failed to sustain the burden of proof on that issue.

In regard to the contention of petitioner that her appointed counsel Steere had failed to seek a change of venue from Franklin county, the trial court found that petitioner after discussing the matter with her counsel had agreed that a change of venue would not be requested. The failure to request a change of venue was apparently trial strategy of counsel with petitioner's full knowledge and agreement. On the issue presented the trial court found that petitioner had failed to meet her burden of proof.

As to the petitioner's contention that her court-appointed counsel conducted the voir dire of the jury to the prejudice of her right to a fair trial, the trial court made the following findings: Several jurors were asked questions by Steere concerning the petitioner's background, particularly the fact that she had been married and divorced a number of times, that petitioner might have been arrested on a DWI charge, and that the petitioner had been imprisoned on previous occasions. In each instance every juror indicated that these facts would not affect his verdict. Mrs. Schoonover prepared a statement of questions covering the subjects mentioned for her counsel to ask the jurors. Included were questions relating to the petitioner's "nine husbands" and her prior prison confinement. The court noted that the context of these questions and the admonition by petitioner to "challenge" jurors indicated that petitioner was not a novice in these matters as she attempted to portray to the court. The court also noted that during the trial and the pretrials petitioner

took a most active role in note taking and conferring with her counsel. The trial court specifically found that the questions propounded by her counsel to various jurors concerning the petitioner's background and record were done so with the awareness of petitioner and with her consent and constituted trial strategy. It concluded that the petitioner had failed to meet the burden of proof on this issue.

This court has carefully reviewed the evidentiary record pertaining to each of the issues just discussed and is convinced that the findings of fact of the trial court pertaining thereto are fully sustained by the evidence presented at the hearing. Furthermore in her statement of points raised by this appeal the petitioner does not challenge the sufficiency of the evidence to support those findings. Under the circumstances we must accept the findings of fact of the trial court as to those issues.

The issue involved on this appeal is whether the petitioner was denied her constitutional right to the effective assistance of counsel because her court-appointed counsel entered into a written agreement with her providing for the payment of a contingent fee based upon the outcome of the trial. On this issue there is no real factual dispute. As stated above on the evening her husband was killed, October 24, 1973, Mrs. Schoonover telephoned Myron S. Steere and following a conversation at her home he agreed to and did represent her in defense of the murder charge. At the time Mrs. Schoonover first employed Steere she apparently did not have funds of her own to pay an attorney fee. She apparently had no hope of inheriting any property from her deceased husband, J. W. Schoonover, in the event she should be convicted of his murder. K.S.A. 1973

Supp. 59-513 provides in substance that no person who shall be convicted of feloniously killing another person shall inherit or take by will or by intestate succession any portion of his estate or property in which the decedent had an interest. Following the filing of the complaint charging murder in the first degree Mrs. Schoonover's indigency was called to the attention of the county court. With the consent of Mrs. Schoonover, Myron S. Steere was appointed on November 7, 1973, as counsel to represent her. Thereafter Mr. Steere represented Mrs. Schoonover at the preliminary examination in the county court of November 26, 1973, at the hearing of several pretrial motions in the district court in January and February 1974, at the trial of the case before a jury in March of 1974, and following her conviction at the presentation of a motion for a new trial on April 26, 1974. On August 30, 1974, after Mrs. Schoonover had been sentenced and confined in the Correctional Institution for Women at Lansing, Kansas, petitioner discharged Steere as her counsel. In this 60-1507 hearing the petitioner has been and is represented by her retained counsel, Thomas W. Brooks and William D. Hamblin, both practicing attorneys in Overland Park, Kansas.

The contingent fee contract which is the focal point in this case was executed by petitioner and Steere on March 4, 1974, a few days prior to the commencement of the jury trial. By the terms of this contract Mrs. Schoonover employed Steere to represent her against the charge of murder in the first degree and then it provided as follows:

> "The undersigned further understands and knows that you have been appointed to represent her by the court as she has no funds at this time

with which to pay for her defense in the case of State v. Schoonover. In the event she is found not guilty of the charges filed against her, is acquitted, or otherwise goes free, the undersigned agrees to pay you all of the right, title and interest she may be entitled to in the estate of J. W. Schoonover, deceased, except the sum of $10,000.00 for your services herein.

"It is understood that if she is convicted of a lesser offense that does not take away her inheritance from the said J. W. Schoonover, that you will be entitled to the same fee.

"It is further understood that you will not receive any moneys from the State of Kansas for representing her if she is acquitted or otherwise goes free."

The thrust of the petitioner's position is that she was denied effective assistance of counsel as a matter of law because her appointed counsel was guilty of dishonesty and unethical conduct in entering into a contingent fee contract in a criminal action in violation of the Code of Professional Responsibility, DR 2-106 (A) and (C), which provides as follows:

"DR 2-106 Fees for Legal Services

"(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

. . .

"(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case."

BLEED THROUGH POOR COPY

In her brief Mrs. Schoonover emphasizes that she is neither claiming that her court-appointed counsel was negligent, nor is she contending that he was inept. She contends that he was dishonest and therefore her right to honest and diligent counsel was denied her. Following the evidentiary hearing the trial court found that the contingent fee contract had been entered into between the parties on March 4, 1974, and that thereafter the state of Kansas had paid to Steere as appointed counsel the sum of $4,227 for his services. The trial court further found that the contingent fee contract was in violation of DR 2-106 (C) of the Code of Professional Responsibility. The trial court in its findings pointed out that the fact that counsel entered into an unethical agreement and breached his professional responsibility may expose him to disciplinary sanctions but this, standing alone, does not constitute inadequate and ineffective representation. The agreement called for a payment of a substantial sum (approximately $50,000) if petitioner were found not guilty of any felonious killing of her husband. It would inure to counsel's financial benefit to have petitioner either acquitted or found guilty of involuntary manslaughter or a lesser offense since under K.S.A. 59-513 one who feloniously kills another person may not inherit from the estate of the deceased. The trial court then found that petitioner had failed to sustain the burden of proof that the contingent fee contract violated her right to adequate and effective assistance of counsel.

The petitioner's three points on this appeal are stated as follows:

> "(1) It was error for the Court to hear evidence that experienced trial counsel had proceeded unethically and dishonestly with this petitioner and

fail to rule that such behavior constituted ineffective and inadequate counsel.

"2. It was error for the Court to rule that the adequacy of counsel must be judged by the totality of the representation when the evidence indicated counsel acted unethically and dishonestly with his client, the Court and the State of Kansas.

"3. It was error for the Trial Court to fail to rule that dishonest counsel is per se ineffective and inadequate."

We interpret the petitioner's statement of points on the appeal to raise a single basic contention that the petitioner was denied effective assistance of counsel as a matter of law because of the fact that court-appointed counsel Steere was unethical and dishonest in entering into the contingent fee contract on March 4, 1974.

The test to be applied generally in determining the adequacy and effectiveness of an attorney's services on behalf of an accused in a criminal action is stated in *Winter* v. *State*, supra, in the following language:

"The adequacy and effectiveness of an attorney's services on behalf of an accused in a criminal action must be gauged by the actual representation afforded the accused in its totality. To be a denial of an accused's constitutional rights it must clearly appear that the representation of the accused was wholly ineffective and inadequate. (*State* v. *Richardson*, 194 Kan. 471, 487, 399 P. 2d 799; and *Widener* v. *State*, 210 Kan. 234, 236, 499 P. 2d 1123.) The burden is on the petitioner to show the representation by his attorney was so incompetent and inadequate that the total effect

POOR COPY
BLEED THROUGH

was that of a complete absence of counsel. (*Shores* v. *State*, 195 Kan. 705, 709, 408 P. 2d 608; *Toland* v. *State*, 200 Kan. 184, 434 P.2d 550; and *Baker* v. *State*, 204 Kan. 607, 614, 464 P. 2d 212.)" (p. 603.)

The totality of circumstances rule stated in *Winter* is quoted with approval in *State* v. *Banks*, 216 Kan. 390, 532 P. 2d 1058. Considering the totality of circumstances as shown by the evidentiary record before us we cannot say that the trial court erred in holding that the petitioner failed to prove that she was denied her constitutional right to the effective assistance of counsel.

The petitioner maintains that in this case it was error for the trial court to hold that adequacy of counsel must be judged by the totality of the representation since the undisputed evidence here showed that court-appointed counsel was guilty of unprofessional conduct in entering into a contingent fee contract in a criminal case. We do not agree. In their brief, counsel for Mrs. Schoonover have not called our attention to any cases holding that unprofessional conduct in violation of a disciplinary rule contained in the Code of Professional Responsibility constitutes ineffective and inadequate counsel as a matter of law. In our judgment unprofessional conduct on the part of court-appointed counsel is simply one factor to be considered as a part of the totality of circumstances in making a judicial determination as to whether an indigent defendant has been provided representation by effective counsel. In the American Bar Association Standards relating to The Defense Function § 1.1, the relationship between unprofessional conduct and the effectiveness of counsel is stated to be as follows:

"The Defense Function

"1.1 Role of defense counsel; function of standards.

. . .

"(f) In this report the term 'unprofessional conduct' denotes conduct which is or should be made subject to disciplinary sanctions. Where other terms are used, the standard is intended as a guide to honorable professional conduct and performance. These standards are *not* intended as criteria for the judicial evaluation of the effectiveness of counsel to determine the validity of a conviction; they may or may not be relevant in such judicial evaluation, depending upon all the circumstances."

In the present case the evidence showed clearly that court-appointed counsel was guilty of unprofessional conduct in entering into a contingent fee contract with his client in a criminal case. This was a violation of the Code of Professional Responsibility, DR 2-106 (C), and in addition was contrary to the ABA Standards relating to The Defense Function § 3.3. In its memorandum opinion the trial court so found and expressed its concern about the matter. Following his determination of the case Judge Barbara forwarded a copy of his decision and opinion along with a copy of the contingent fee contract to the disciplinary administrator for consideration and appropriate action. Disciplinary action was in fact taken by the State Board of Law Examiners which recommended to the court that Steere be disciplined by public censure. Mr. Steere elected in writing to accept the recommended discipline. This court followed the recommendation of the State Board of Law Examiners and issued its order

of public censure on June 2, 1975. (*In re Steere,* 217 Kan. 276, 536 P. 2d 54.)

In *Widener* v. *State,* 210 Kan. 234, 499 P. 2d 1123, it was contended that a violation of the Code of Professional Responsibility per se constituted ineffective and inadequate assistance of counsel. There the defendant claimed that he was denied the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution because his appointed counsel was the elected probate judge of Cowley county whose representation of the defendant conflicted with his duties as probate judge. We held that the adequacy and effectiveness of counsel provided for an accused as guaranteed by the Constitution of the United States must be measured by the *actual representation* afforded the accused. We stated that we were not concerned in that case with the judicial and professional ethics involved when a judge practices law. We then held that the accused had not been denied the effective assistance of counsel merely because his court-appointed counsel held the office of probate judge of Cowley county.

In any criminal action we are, of course, greatly concerned with a violation of the professional code by participating counsel. Where violations occur, prompt disciplinary action should be taken. However, such unprofessional conduct may or may not be relevant as criteria for the judicial evaluation of the effectiveness of counsel, depending upon all the circumstances.

We wish to emphasize that under certain circumstances a contingent fee contract followed by subsequent actions of defense counsel may constitute ineffective assistance of counsel in violation of the constitutional rights of an accused. For example, in *United*

States Ex Rel. Simon v. *Murphy*, 349 F. Supp. 818 (Dist. Ct. Pa. 1972) it was held that under the totality of circumstances the actions of defense counsel with a contingent fee contract created a conflict of interest which required the granting of a new trial. The circumstances in that case were much different from those in the present case. There the prosecutor advised defense counsel he would accept a plea of guilty to a lesser offense, contingent upon acceptance of the offer prior to the swearing of the jury. Defense counsel did not timely communicate to the accused the fact that the prosecutor had offered to accept the plea of guilty to a lesser offense. He counseled her to persist in her not guilty plea. The court stated that a conflict of interest arises where the lawyer is faced with the task of giving advice to the client on optional courses of action where the lawyer stands to benefit personally from the adoption of one course to the exclusion of the other. The court held that the lawyer's contingent fee agreement created a conflict between his personal interests and those of his client. The circumstances presented in the case now before us are entirely different. Here the testimony showed that Mrs. Schoonover insisted upon being tried as charged and she emphatically refused to permit her counsel to enter into plea negotiations. Furthermore, considering the contingent fee contract in this case, it is obvious that counsel would have been motivated in the direction of diligent representation. The record is completely devoid of evidence that the prosecutor suggested to defense counsel that plea bargaining might be fruitful. In fact the undisputed testimony of the county attorney, Robert L. Pinet, was that he was in no position to do anything but try Mrs. Schoonover as charged.

For the reasons set forth above the judgment of the district court is affirmed.

VERBATIM TEXT OF ALL STATUTES CITED IN ORDER OF PRESENCE

28 U.S.C.A. 1257 (3), appearing at T.28 U.S.C.A. secs. 1251-1292, p. 144 states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) . . .
>
> (2) . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

K.S.A. 21-3401, appearing at volume 2A of the Kansas Statutes Annotated, p. 260, states:

> Murder in the first degree is the killing of a human being committed maliciously, willfully, deliberately and with premeditation or committed in the perpetration or attempt to perpetrate any felony.
>
> Murder in the first degree is a class A felony.

K.S.A. 60-1507, appearing at volume 4 of the Kansas Statutes Annotated, p. 568, states:

> A prisoner in custody under sentence of a court of general jurisdiction claiming the right to be re-

> leased upon the ground that the sentence was imposed in violation of the constitution or laws of the United States, or the constitution or laws of the state of Kansas, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may at any time move the court which imposed the sentence to vacate, set aside or correct the sentence.

K.S.A. 59-513, appearing in the Supplement to volume 4 of the Kansas Statutes Annotated, at p. 181, states:

> No person who shall be convicted of feloniously killing, or procuring the killing of, another person shall inherit or take by will, by intestate succession, as a surviving joint tenant, as a beneficiary under a trust or otherwise from such other person any portion of his estate or property in which the decedent had an interest.

K.S.A. 21-3904, appearing at volume 2A of the Kansas Statutes Annotated, p. 293, states:

> Presenting a false claim is knowingly and with intent to defraud presenting a claim or demand which is false in whole or in part, to a public officer or body authorized to audit, allow or pay such claim.
>
> Presenting a false claim for fifty dollars or more is a class E felony.